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CHARLES ELMORE

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1934.

No. 34

Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation,

Petitioners,

vs.

The City of Los Angeles, a municipal corporation,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

RAY L. CHESEBRO,
City Attorney,
LOREN A. BUTTS,
Special Counsel,
City Hall, Los Angeles, California,
Solicitors for the Respondent.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1934.

No. 918.

Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation,

Petitioners,

vs.

The City of Los Angeles, a municipal corporation,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF FACTS.

This action was brought by respondent for the purpose of quieting title to a small parcel of tideland which forms a part of the shore of Mormon Island, which island is situated in the inner bay of San Pedro, now known as Los Angeles Harbor, being a harbor, bay, or inlet of the

Pacific Ocean, which harbor, bay, or inlet has at all times subsequent to the 9th day of September, 1850, been within the exterior boundaries of the State of California.

In the year 1880 a survey was made of said island by one, W. H. Norway, and the field notes and plat of said island as prepared by the surveyor were filed in the office of the United States Surveyor General and the Commissioner of the General Land Office. In the survey of Mormon Island the surveyor meandered the shore thereof, which was in accordance with the printed manual of surveying instructions issued by the General Land Office, and in accordance with the terms of his contract. Mormon Island was designated as Lot 1 of Section 8, Township 5 South, Range 13 West, San Bernardino Meridian.

Thereafter, and in the year 1881, a patent was issued to William Banning which purported to convey to William Banning all of Lot 1 of Section 8, Township 5 South, Range 13 West, San Bernardino Meridian. The land described in the patent to Banning was described in reference to the plat of the Norway survey. The description of the land contained in the patent was as follows, to-wit:

> "Lot numbered one, of section eight, in township five south, of range thirteen west of San Bernardino Meridian, in California, containing eighteen acres, and eighty-eight hundredths of an acre, **according to the Official Plat of the Survey of said Lands, returned to the General Land Office by the Surveyor General.*" [R. 660.]

The official plat of the survey of said land shows all of Lot 1, Section 8, Township 5 South, as bordering on

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*All italics ours unless otherwise specified.

navigable water of the inner bay of San Pedro [Petitioners' Ex. D; Book of Exhibits 31]. Only a small portion of Mormon Island was and is above the line of mean high tide of the Pacific Ocean. The portion of the island which is upland, or above the line of mean high tide, is a long, narrow strip or parcel of land in the central part of the island. The land involved in this action is situated at the north end of the island and lies between the line of mean high tide and the meander line of the Norway survey.

It is the contention of the respondent in this action that:

(1) The traverse lines of the Norway survey are meander lines and that such meander lines were not intended to and do not constitute the actual boundary line between tideland and upland on Mormon Island, the line of mean high tide of the Pacific Ocean being the actual boundary line between tideland and upland.

(2) The land involved in this action is tideland and therefore was not, subsequent to the 9th day of September, 1850, public property of the United States; the same was owned and held by the State of California by virtue of its sovereignty. The United States had not at any time subsequent to September 9, 1850, jurisdiction to patent, grant or transfer said lands to William Banning or anyone else, and that said patent, in so far as it attempted to grant or convey lands below the line of mean high tide, was invalid and void.

(3) When the United States conveys a tract of public land by patent, referring to an official plat which shows the same bordering on navigable water, the patentee takes title only up to the water line.

The Respondent's Title to the Land Involved in This Action.

Upon the admission of the State of California into the Union it became the owner of all the tidelands within its borders by virtue of its sovereignty, save and except such tidelands as may have been granted away prior to the Treaty of Guadalupe Hidalgo.

Knight v. U. S. Land Assn., 142 U. S. 161;
Shively v. Bowlby, 152 U. S. 1;
United States v. Mission Rock Co., 189 U. S. 391;
People v. Kerber, 152 Cal. 731;
Ross v. Burkhard Investment Co., 90 Cal. App. 201.

By act of the Legislature of the State of California, approved and made effective May 1, 1911 (Stats. of California, 1911, p. 1256), and by act of the Legislature of said state amendatory thereof, approved April 20, 1917, effective July 27, 1917 (Stats. of California, 1917, p. 159), the State of California granted to respondent, the City of Los Angeles, a municipal corporation, and to its successors, all of the right, title and interest of the State of California held by said state by virtue of its sovereignty in and to all tide and submerged lands, whether filled or unfilled, within the then boundaries of the City of Los Angeles and situated below the line of mean high tide of the Pacific Ocean and of any harbor, estuary, bay or inlet of the Pacific Ocean within the said boundaries of the City of Los Angeles. These acts of the Legislature hereinabove referred to conveyed the title to all of the tidelands of the State of California within the then boundaries of the City of Los Angeles to the

respondent herein, which it now owns and holds in its governmental capacity in trust, which is identical with the public trusts upon which the state had originally received and held said lands up to the time of its grant of the same to the City of Los Angeles.

City of Los Angeles v. Anderson, 206 Cal. 662, 668;

Patton v. City of Los Angeles, 169 Cal. 521, 524;

Los Angeles v. Pacific Coast S. S. Co., 45 Cal. App. 15.

There Is No Important Question of Law Involved in This Action and No Conflict of Decision Between the Circuit Court of Appeals and the Decisions of This Honorable Court or the Supreme Court of the State of California.

This action involves the question of the ownership of a small parcel of tideland forming a part of the shore of Mormon Island situated within the inner bay of San Pedro Harbor, said action being one to quiet title to said parcel of tideland.

The questions involved herein are two in number and may be stated as follows:

(1) Does a meander line run in surveying a fractional portion of the public land bordering upon navigable tidewater constitute the boundary line between tideland and upland, or is the line of mean high tide the actual boundary?

(2) Has the Land Department of the federal government jurisdiction or authority to issue a patent or make a grant or conveyance of tideland, which tideland is not public property of the United States but is owned and held by the State of California by virtue of its sovereignty?

It has been decided again and again by this court, as well as the other federal courts, that meander lines are run in surveying fractional portions of public lands bordering upon navigable streams or other bodies of navigable water, not as boundaries of the tract but for the purpose of determining the quantity of upland granted and to be paid for by the purchaser; the waters themselves constitute the real boundary. And, it has also been decided numerous times that after a state has been admitted into the Union on an equal footing with the original thirteen states Congress has no power or authority to issue a patent or make a grant or conveyance of tidelands situated within such state, or to authorize the issuance of a patent or the making of a conveyance or grant of such tidelands. The decisions of this Honorable Court on these questions hereinabove referred to are numerous, but in the interest of brevity only a few will be hereinafter referred to.

The Traverse Lines as Established by Norway Are Meander Lines.

It is conceded by petitioners that at the time of the Norway survey Mormon Island was entirely surrounded by navigable water. The petitioners allege as a special defense to the action that the island was surveyed by Norway "in strict conformity with the printed manual of surveying instructions issued by the General Land Office" [R. 45-46]. The printed manual of surveying instructions provided that all navigable rivers and other navigable water should be meandered [R. 676]. The surveyor

Norway, after describing the point where he started his traverse of Mormon Island and after describing the location of meander corner No. 1, makes the following statement: "From this point I meander around the Island at ordinary high water mark", [R. 684]. The courses and distances of the traverse of the Norway survey, as shown on the plat [Petitioners' Ex. D; Book of Exhibits 31], are designated as "meanders of the shore of Mormon Island". From the above it is clear that Norway followed instructions and that in his survey of Mormon Island he intended to and did meander the shore thereof.

The petitioners do not contend that the traverse lines as established by Norway are not "meander lines", but argue that there is something peculiar about the meander lines as established by Norway which makes such lines boundary lines. We are unable to see any distinction between the meander lines which have been surveyed by other surveyors employed by the federal government, and which were involved and referred to in the cases cited by the Circuit Court of Appeals in its opinion in this case and in the cases which will be hereinafter referred to by the respondent in support of its contention that a meander line does not constitute a boundary line between tideland and upland, and the meander line surveyed around Mormon Island by the surveyor Norway.

Meander lines have been defined by this court in the case of *Niles v. Cedar Point Club*, 175 U. S. 300, as

> "lines which course the banks of navigable streams or other navigable waters".

The Meander Line of the Norway Survey Is Not the Boundary Line Between Tideland and Upland on Mormon Island.

Meander lines are run in surveying fractional portions of public lands bordering upon navigable streams or other bodies of navigable water, not as boundaries of the tract but for the purpose of determining the quantity of upland granted to and to be paid for by the purchaser. The waters themselves constitute the true boundary line between tideland and upland.

Railroad Company v. Schurmeir, 7 Wall. 272;

Jefferis v. East Omaha Land Co., 134 U. S. 178;

Hardin v. Jordan, 140 U. S. 371;

Mitchell v. Smale, 140 U. S. 406;

Horne v. Smith, 159 U. S. 40;

Producers Oil Co. v. Hanzen, 238 U. S. 325;

United States v. Boynton, 53 Fed. (2d) 297;

Coburn v. San Mateo County, 75 Fed. 520.

Decisions of California courts:

Los Angeles v. San Pedro etc. R. R. Co., 182 Cal. 652; certiorari denied, 254 U. S. 636;

Curtis v. Upton, 175 Cal. 322;

Kirby v. Potter, 138 Cal. 686;

Hendricks v. Feather River Canal Co., 138 Cal. 423;

Matteson v. McCarty, 98 Cal. App. 45;

City of Los Angeles v. Duncan, 130 Cal. App. 11.

In the case of *Hardin v. Jordan, supra,* the court said:

> "It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held, both by the Federal and state courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitue the real boundary. Railroad Co. v. Schurmeir, 7 Wall. 272; Jefferis v. East Omaha Land Co., 134 U. S. 178; Middleton v. Pritchard, 3 Scam. 510; Canal Trustees v. Haven, 5 Gilm. 548, 558; Houck v. Yates, 82 Illinois, 179; Fuller v. Dauphin, 123 Illinois, 542; Boorman v. Sunnuchs, 42 Wisconsin, 223, 235; Pere Marquette Boom Co. v. Adams, 44 Michigan, 403; Clute v. Fisher, 65 Michigan, 48; Ridgeway v. Ludlow, 58 Indiana, 248; Kraut v. Crawford, 18 Iowa, 549; Forsyth v. Smale, 7 Bissell, 201; Rev. Stat. Secs. 2395, 2396."

The Norway survey was made for the purpose of determining how much money the applicant Banning would be required to pay the government for the upland which he was seeking to acquire. It could not be argued that Banning was seeking to acquire title to tideland situated and located in the State of California from the federal government. The survey was made in the year 1880 and the patent issued to him in the year 1881, and at that

time all tideland within the exterior boundary of the State of California was owned and held by the State of California by virtue of its sovereignty.

It may be a question of fact as to whether or not a line established and surveyed by a surveyor employed by the federal government to survey public land was intended as a meander line or as a boundary line of the tract surveyed. The plat of the survey [Petitioners' Ex. D; Book of Exhibits 31] shows that the land described in the patent issued to Banning was bounded by water on all sides. This clearly indicates and is conclusive evidence that the traverse lines were intended as meander lines and not as boundary lines, and that the water line was the boundary of the tract described in the patent. It could not be successfully argued that the government intended to convey title to property which was not at the time public property of the United States.

The only land on Mormon Island which was subject to the jurisdiction of the Land Department and subject to sale or other disposition by that department was the upland, and a patent to Banning could not operate as a conveyance of title to any property which was not at the time public property of the United States.

The San Pedro R. R. Case, 182 Cal. 652, Certiorari Denied, 254 U. S. 636

All of the points urged by the petitioners herein have been decided adversely to their contention by the Supreme Court of the State of California in the case of *Los Angeles v. San Pedro etc. R. R. Co.*, 182 Cal. 652. That action was one to quiet title to a small parcel of tideland situated in the bay at San Pedro directly across the channel from Mormon Island. In that case it was con-

tended that the survey and the patent which had been issued were conclusive evidence of the boundary line. In that case the Supreme Court of the State of California held that the meander line as established in connection with the survey of the land did not constitute the boundary line, but that the water constituted the true boundary. In that case the court said (p. 654):

> "* * * The law is thus stated in the syllabus to the opinion of the supreme court of the United States in Jefferis v. East Omaha Land Co., 134 U. S. 178 (33 L. Ed. 872, 10 Sup. Ct. Rep. 523, see, also, Rose's U. S. Notes): 'Meander lines are run in surveying public lands bordering upon navigable rivers, not as boundaries of the tract, but to ascertain the quantity of the land subject to sale; and the watercourse, and not the meander line, as actually run on the land, is the boundary.' See, also, Railroad Co. v. Schurmeir, 7 Wall. 272 (19 L. Ed. 74). * * *"

It was also determined by the court in that case that the line of mean high tide was the actual boundary line between tideland and upland. It was conceded, however, that the line of mean high tide was 5.1 feet above the datum plane of mean lower low water.

There is no conflict between the decision of the Circuit Court in the above entitled action and the decision of the Supreme Court of the State of California in the *San Pedro R. R. Co.* case and other decisions of the California courts on the same questions. In view of the fact that a petition for a writ of certiorari was denied by this court in the *San Pedro R. R.* case, it would seem that further argument or citation of authority that a meander line

does not constitute the boundary line between tideland and upland in California and that the line of mean high tide is the actual boundary, is unnecessary.

The petitioners argue that the *San Pedro R. R.* case is not in point for the reason that there was no attempt in that case to disturb or reject any of the meander corners of the survey.

A meander corner established by a surveyor on land bordering upon navigable water is no more fixed and permanent than a meander line. In the case of *United States v. Boynton*, 53 Fed. (2d) 297, the court said:

> "* * * Because a meander line, as carried into field notes, shows *corners, posts, monuments,* and courses, does not result in the line so delineated becoming definite and fixed. * * *."

One of the reasons why a meander line does not constitute the boundary line between tideland and upland is that the boundary line is subject to such changes as may result from the action of the tide or the flow of the water. It is well settled that where the water line constitutes the boundary, no matter how much the line may shift or change where such shifting and changing is the result of natural causes, the water line continues to be the boundary.

Jefferis v. East Omaha Land Co., 134 U. S. 178;
United States v. Boynton, 53 Fed. (2d) 297.

See, also:

City of Oakland v. Buteau, 180 Cal. 83.

The Land Department Has No Jurisdiction to Fix and Establish the Boundary Line Between Tideland and Upland.

Petitioners argue that the Land Department is a special, statutory tribunal with power and jurisdiction to fix and establish the boundary line between tideland and upland; that the patent issued to William Banning is conclusive evidence of such boundary line and that it conveyed title to all the land described therein regardless of whether or not a portion of the area described in said patent was in fact below the line of mean high tide of the Pacific Ocean and regularly covered and uncovered by the ebb and flow of the tide. The petitioners' contention in this regard is based on the fact that the Land Department is authorized to survey public lands. Conceding that the Land Department has jurisdiction to survey public land, however, in surveying public land bordering on navigable water it has no jurisdiction to extend such surveys beyond the limit of high water. (Act of February 11, 1805, ch. 14, 2 Stats. 313; R. S. 2396; 43 U. S. C. A. 752.)

The petitioners also argue that the Land Department actually exercised jurisdiction over the land involved in this action. Even if it be conceded that the Land Department attempted to exercise jurisdiction over the land involved in this action—and it is not so conceded—its acts would be a nullity and of no force or effect. The Land Department has only such jurisdiction as has been expressly conferred upon it by Congress. Congress has exclusive control and jurisdiction over the sale or other disposition of public lands. (Art. IV, Sec. 3, Clause 2, United States Constitution.) Congress has never authorized the Land Department to dispose of tidelands or to

extend its surveys and grants beyond the limit of high water.

Donnelly v. United States, 228 U. S. 243;
Mann v. Tacoma Land Co., 153 U. S. 273;
Barney v. Keokuk, 94 U. S. 324.

In the case of *Donnelly v. United States, supra,* at pages 261 and 262, the court said:

"'And since this court, in the case of The Genesee Chief, 12 *Id.* 443, has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amendable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. *It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.* The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated.'

"The doctrine thus enunciated has since been adhered to. Packer v. Bird, 137 U. S. 661, 669; Hardin v. Jordan, 140 U. S. 371, 382; Shively v. Bowlby, 152 U. S. 1, 40, 58; St. Anthony Falls Water Power Co. v. Water Commissioners, 168 U. S. 349, 358; Scott v. Lattig, 227 U. S. 229, 243."

Congress could have made grants directly or authorized the Land Department to dispose of tidelands in California prior to the admission of the State of California into the

Union, but it never did so. The matter of the disposition of the tidelands was left to the State of California.

Weber v. Harbor Commissioners, 18 Wall. 57;
United States v. Mission Rock Co., 189 U. S. 391;
McGilvra v. Ross, 215 U. S. 70.

In the case of *United States v. Mission Rock Co., supra,* which was an action involving the title to certain tidelands in San Francisco Bay, the court cited with approval and quoted from the case of *Weber v. Harbor Commissioners, supra,* at page 65, wherein the court said:

> "'Although the title to the soil under the tide-waters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as he might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government.'"

We concede that the Land Department has jurisdiction to survey public lands which are a part of the public domain of the United States, but the jurisdiction of the Land Department in surveying Mormon Island was limited to the establishment of a meander line around the shore of the island.

The Land Department has no jurisdiction over lands which are not public lands of the United States.

THE LANDS INVOLVED IN THIS CASE ARE TIDELANDS, AND TIDELANDS ARE NOT PUBLIC LANDS OF THE UNITED STATES.

The jurisdiction of the Land Department is limited and restricted to the sale or other disposition of public lands. "Public Lands" have been defined to be "such lands belonging to the government as are subject to sale or other disposal under general laws"; *Southern Pacific Co. v. City of Reno,* 257 Fed. 450, 461-462, in which case the court said:

> "The term 'public lands' has been and is habitually employed in our legislation to designate 'such lands belonging to the government as are subject to sale or other disposal under general laws.' Newhall v. Sanger, 92 U. S. 761, 763, 23 L. Ed. 769; Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963; Bardon v. Northern Pac. R. R. Co., 145 U. S. 535, 538, 12 Sup. Ct. 856, 36 L. Ed. 806; Mann v. Tacoma Land Co., 153 U. S. 273, 284, 14 Sup. Ct. 820, 38 L. Ed. 714."

See, also:

Doolan v. Carr, 125 U. S. 618.

Tidelands are not public lands.

Mann v. Tacoma Land Co., 153 U. S. 273, in which case the court said (p. 284):

"It is unnecessary, in view of this recent examination of the question, to enter into any discussion respecting the same. *It is settled that the general legislation of Congress in respect to public lands does not extend to tide lands.* There is nothing in the act authorizing the Valentine Scrip, or in the circumstances which gave occasion for its passage, to make an exception to the general rule. It provided that the

> scrip might be located on the unoccupied and unappropriated public lands, but the term 'public lands' does not include tide lands. As said in Newhall v. Sanger, 92 U. S. 761, 763: 'The words "public lands" are habitually used in our legislation to describe, such as are subject to sale or other disposal under general laws.' See, also, Leavenworth etc. Railroad v. United States, 92 U. S. 733; Doolan v. Carr, 125 U. S. 618."

Petitioners state [Pet. 28] that when California was admitted into the Union it took title to public lands subject to the future exercise of the federal power, including "power to dispose of and make all needful rules and regulations respecting the territory *or other property belonging to the United States*".

We have hereinabove pointed out that tidelands are not public lands, and it is admitted by the petitioners that upon the admission of the State of California into the Union it became the owner of all tidelands within its borders. The land involved in this action being tideland, it was, therefore, the property of the State of California at the time of the Norway survey and the issuance of the patent to Banning and was not "property belonging to the United States", and therefore the Land Department had no jurisdiction over the same.

Acreage Not Controlling.

Petitioners refer to the fact that the patent of Banning contained the statement "containing eighteen and eighty-eight hundredths of an acre" in support of their contention that the meander lines of the Norway survey constitute the boundary line and that the Land Department exercised jurisdiction in establishing said boundary line.

It is well settled that a reference in a patent to acreage is not controlling in the matter of determining the actual boundary line. In support thereof, we call the court's attention to the case of *Greene v. United States,* 174 Fed. 145, wherein, at page 150, the court said:

> "That acreage is not controlling in limiting the grant is clearly shown by the above case (Mitchell v. Smale, 140 U. S. 406, 412, 11 Sup. Ct. 819, 840, 35 L. Ed. 442). There are many others of the same purport.
>
> "In Johnson v. Johnson, 14 Idaho, 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1251, the patent called for a tract of 86.06 acres. The natural object was held to be the boundary and to carry with it 143 acres.
>
> "Where the survey mentioned in a patent calling for 80 acres depicted a lake as a boundary, and the meander line did not coincide with the lake shore, the lake was decided to be the boundary, and the patent was held to convey 100 acres lying between the meander line and the like. Barringer v. Davis, 141 Iowa, 428, 120 N. W. 65. See, also, Lindsey v. Hawes, 2 Black, 554, 560, 17 L. Ed. 265; Brown v. Huger, 21 How. 305, 16 L. Ed. 125; St. Clair v. Lovingston, 23 Wall. 46, 63, 23 L. Ed. 59; Grand Rapids & Indiana R. Co. v. Butler, 159 U. S. 87, 15 Sup. Ct. 991, 40 L. Ed. 85; St. Anthony Falls Water Co. v. Board, etc., 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497; Chapman & Dewey v. St. Francis Levee District, 232 U. S. 186, 197, 34 Sup. Ct. 297, 58 L. Ed. 564."

A Patent Issued to Public Land Bordering Upon Navigable Tide Water Conveys Title Up to the Water Line Only.

The land described in the patent issued to William Banning was not described by metes and bounds but was described as Lot 1 of Section 8, Township 5 South, Range 13 West, San Bernardino Meridian, in California, containing eighteen acres and eighty-eight hundredths of an acre according to the official plat of the survey of the said lands returned to the General Land Office by the Surveyor General. [R. 660.]

The only portion of the island which was subject to sale or other disposition by the Land Department was such land as was above the line of mean high tide. All land below that line was tideland, title to which was vested in the State of California. It could not be successfully argued that the government intended to or could convey land which it did not own and which was not "public land of the United States" and subject to sale or other disposition by the Land Department.

Patents are to be strictly construed against the grantee. Such public grants convey nothing by implication but are construed strictly in favor of the government, and unless the necessary and unavoidable construction of the patent shows a plain intent to convey the land in question it will not be so construed.

Shively v. Bowlby, 152 U. S. 1, 10.

Grants by Congress of portions of public lands, though bordering on or bounded by navigable water, convey of

their own force title only to the upland or what lies above ordinary high water mark.

McGilvra v. Ross, 215 U. S. 70;
Eldridge v. Trezevant, 160 U. S. 452;
Hardin v. Jordan, 140 U. S. 371.

In the case of *McGilvra v. Ross, supra,* at pages 78-80, the court said:

> "It was observed that the United States, while it held the country as a Territory, having all the powers of national and of municipal government, might have granted for appropriate purposes rights and titles below high-water mark. See United States v. Winans, 198 U. S. 371; Prosser v. Northern Pacific R. R., 152 U. S. 59. But, it was said, that they had never done so by general laws, but had considered it 'as most in accordance with the interest of the people and with the object for which the Territories were acquired of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states respectively, when organized and admitted into the Union.' This policy, it was remarked, as 'to navigable waters and the soils under them, whether within or *above* the ebb and flow of the tide,' has been 'constantly acted upon.' And hence it was further said: 'Grants by Congress of portions of the public lands within a Territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and

dominion of the future state when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution of the United States.' The conclusion necessarily follows, as expressed by the court, that the state may dispose of its lands under navigable waters 'free from any easement of the upland proprietor.'

"Joy v. St. Louis, 201 U. S. 332, is to the same effect. See, also: Scranton v. Wheeler, 179 U. S. 141, 190; United States v. Mission Rock Co., 189 U. S. 391; Kansas v. Colorado, 206 U. S. 46-93. * * *."

In the case of *Hardin v. Jordan, supra,* the court said (p. 381):

"With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States. Pollard v. Hagan, 3 How. 212; Goodtitle v. Kibbe, 9 How. 471; Weber. v. Harbor Commissioners, 18 Wall. 57. * * *."

The Cases Relied Upon by Petitioners in Support of Their Contention That the Land Department Had Jurisdiction to Establish the Boundary Line Between Tideland and Upland Are Not Applicable to the Facts in This Case.

The cases upon which the petitioners rely most strongly in support of their contention that the Land Department had jurisdiction to establish the boundary between tideland and upland are: *United States v. Coronado Beach Co.*, 255 U. S. 472; *Knight v. United Land Assn.*, 142 U. S. 161; *Cragin v. Powell*, 128 U. S. 691; *Heath v. Wallace*, 138 U. S. 573; *Russell v. Maxwell Land Grant Co.*, 158 U. S. 253; *U. S. ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316; *West v. Standard Oil Co.*, 278 U. S. 200; *Stoneroad v. Stoneroad*, 158 U. S 240; *Catholic Bishop of Nesqually v. Gibbons*, 158 U. S. 155; also the California cases of *Jameson v. James*, 155 Cal. 275, and *Foss v. Johnstone*, 158 Cal. 119.

The case upon which petitioners rely most strongly in support of their contention that the Land Department had jurisdiction to establish the boundary line between tideland and upland and that the patent issued to William Banning was conclusive, is the case of *Knight v. United Land Assn., supra.* That case is not applicable to the survey in question in this case for the reasons that have been so ably pointed out by the Circuit Court of Appeals in its opinion in this case. That case involved the question of the ownership of certain tidelands in the City of San Francisco to which the City of San Francisco, as

successor of the Mexican pueblo by that name, had acquired title from Mexico prior to the Treaty of Guadalupe Hidalgo, and in that case the court said (p. 184):

> "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tidewaters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty, and jurisdiction in that behalf as the original states possess within their respective borders. Martin v. Waddell, 41 U. S. 16 Pet. 367, 410 (10: 997, 1012); Pollard v. Hagan, 44 U. S. 3 How. 212, 229 (11: 565, 573); Goodtitle v. Kibbe, 50 U. S. 9 How. 471, 478 (13: 220, 223); Mumford v. Wardwell, 73 U. S. 6 Wall. 423, 436 (18: 756, 761); Weber v. State Harbor Comrs., 85 U. S. 18 Wall. 57, 65 (21: 798, 801). Upon the acquisition of the territory from Mexico the United States acquired the title to tidelands equally with the title to upland; but with respect to the former they held it only in trust for the future states that might be erected out of such territory. Authorities last cited. But this doctrine does not apply to lands that had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way. San Francisco v. Le Roy, 138 U. S. 656 (34: 1096). For it is equally well settled that when the United States acquired California from Mexico by the Treaty of Guadalupe Hidalgo (9 Stats. at L. 922), they were bound, under the 8th article of that treaty, to protect all rights of property in that territory emanating from the Mexican government previous to the treaty. Teschemacher v. Thompson, 18 Cal. 11; Beard v. Federy, 70 U. S. 3 Wall. 478 (18: 88).

"Irrespective of any such provision in the treaty, the obligations resting upon the United States, in this respect, under the principles of international law, would have been the same. Soulard v. United States, 29 U. S. 4 Pet. 511 (7: 938); United States v. Perchman, 32 U. S. 7 Pet. 51, 87 (8: 604, 617); Strother v. Lucas, 37 U. S. 12 Pet. 410, 436 (9: 1137, 1147); United States v. Repentigny, 72 U. S. 5 Wall, 211, 260 (18: 627, 643).

"These observations lead directly to the determination of the force and effect of the title of the pueblo of San Francisco, derived from the former government of Mexico, as opposed to the title which it is insisted passed to the State of California upon its admission into the Union by virtue of its sovereignty over all tidelands in the state below the high-water line, even including such as are situated within the limits of the pueblo.

"If we have succeeded in showing that the tract in dispute was part of the land claimed by the city of San Francisco as successor of the Mexican pueblo of that name; that it is within the four square leagues described in the decree of the United States Circuit Court for the District of California, entered May 18, 1865; that that court decided and decreed that the claim of title was valid under the laws of Mexico; that the official survey of the United States officers is correct and followed the decree of confirmation; and that the patent of the government of the United States, following the survey and decree, embraced within its calls the property in dispute: We think it clearly follows that the patent of the government is evidence of the title of the city under Mexican laws, and is conclusive, not only as against the government and against all parties claiming under

it by titles subsequently acquired, but also as against all parties except those who have a full and complete title acquired from Mexico anterior in date to that confirmed by the decree of confirmation. This conclusion is fully sustained by the decisions of this court.

* * * * * * *

"* * * When the United States acquired California it was with the duty to protect all the rights and interests which were held by the pueblo of San Francisco under Mexico. The property rights of pueblos equally with those of individuals were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation. Townsend v. Greeley, 72 U. S. 5 Wall. 326, 337 (18: 547, 549). The duty of the government and its power in the execution of its treaty obligations to protect the claims of all persons, natural and artificial, and, of course, of the city of San Francisco as successor to the pueblo, were superior to any subsequently-acquired rights or claims of the State of California, or of individuals. The confirmation of the claim of the city necessarily took effect upon its title as it existed upon the acquisition of the country. In confirming it, the United States, through its tribunals, recognized the validity of that title at the date of the treaty—at least recognized the validity of the claim to the title as then existing, and in execution of its treaty obligations no one could step in between the government of the United States and the city seeking their enforcement. * * *"

The facts and questions involved in the case of *United States v. Coronado Beach Co.*, 255 U. S. 472, relied upon by petitioners in support of their contention that the

Land Department has jurisdiction to establish the boundary line between tideland and upland, are the same as those in the *Knight* case. In the *Coronado Beach Co.* case the company derived its title from a Mexican grant of May 15, 1846, to one Carillo, a Mexican citizen, the company having succeeded to his rights. In that case one of the questions involved was whether the company owned the tideland in front of the upland on the island. The petition to the board of commissioners to settle private land claims for confirmation of the Mexican grant was denied, but on appeal to the District Court of the United States the title to the lands was declared good and confirmed and thereafter a patent was issued thereto, including the tidelands involved in that action. The decree was filed on January 12, 1867, and on June 11, 1869, a patent was issued to the tideland involved in the action, together with other land. In the *Coronado Beach Co.* case it was contended by the United States that, by reason of the fact that California was admitted to the Union in 1850, the state acquired title to all of the tidelands in said state prior to the date of the decree of the District Court confirming the Mexican grant. This court pointed out in the *Coronado Beach Co.* case that the title of the State of California to tideland was subject to prior Mexican grants and that the decree of confirmation related back to the date of the original grant. In the *Coronado Beach Co.* case this court said:

> "The jurisdiction of the decree and the validity of the patent, so far as they cover the tidelands, is denied by the United States, a special reason being found in the fact that California became a state in 1850, and thereby acquired a title to the submerged lands before the date of the decree. *But the title of the*

state was subject to prior Mexican grants. * * * The title of California was in abeyance until those issues were determined, *as the decree related back to the date of the original grant.* * * *"*

The question as to whether or not a meander line, run in surveying public land bordering on navigable tidewater constitutes the boundary line between tideland and upland, is not presented in any of the other cases cited and relied upon by petitioners, and neither is the question of the jurisdiction of the Land Department to fix and establish the permanent boundary line between tideland and upland, nor the question as to whether or not the Land Department has jurisdiction to issue a patent to tideland, which land is at the time of the issuance of such patent property of the state in which such tideland is situated, presented in any case relied upon by petitioners.

The case of *Catholic Bishop of Nesqually v. Gibbons, supra,* involved the question of the title to a parcel of land which the plaintiff claimed by virtue of an act of Congress establishing the territorial government of Oregon, wherein it was provided that title to the land not exceeding six hundred and forty acres, which was at that time occupied as missionary stations, should be confirmed and set apart to the several religious societies to which the said missionary society belonged. No question involving meander lines or the power of the Land Department to dispose of tideland was involved in that action.

The question presented in the case of *Russell v. Maxwell Land Grant Co., supra,* was similar to the question presented in the *Knight* case. In the *Russell* case the title to the land which was in dispute had been granted to private parties by the territorial governor of New Mexico

prior to the Treaty of Guadalupe Hidalgo. Thereafter Congress passed an act confirming the grant with the boundary specified in the act. Thereafter the surveyor general caused a survey of said land to be made, which survey was returned to the Land Department giving in detail the boundary of said tract. In that action the court held that the survey was not open to attack and that any doubt which may have existed as to the limits of the grant was settled by the act of confirmation. No question of meander line was involved in that action.

The case of *Stoneroad v. Stoneroad, supra,* involved the question as to whether or not it was necessary that a survey should be made of the land which had been granted to private parties prior to the Treaty of Guadalupe Hidalgo, and which grant had been confirmed by act of Congress in order to separate the land embraced in such grant from the public domain.

The cases of *Cragin v. Powell, supra; Heath v. Wallace, supra,* and *Foss v. Johnstone, supra,* involved the survey and segregation of swamp and overflow land. The officials of the Land Department were expressly authorized by statute, to-wit, Act of September 28, 1850, 9 Stats. 519, 43 U. S. C. A. 982, to identify, survey and segregate swamp and overflow land. Even in the case of a survey and segregation of swamp and overflow land from dry land the identification, survey and segregation of such land required the joint act of both state and federal authorities. (Act of July 23, 1866; 14 Stat. 219, 43 U. S. C. A. 987; *Wright v. Roseberry,* 121 U. S. 488; *Tubbs v. Wilhoit,* 138 U. S. 134; see, also, *McCabe v. Goodwin,* 106 Cal. 486.)

The case of *Jameson v. James, supra,* involved a question as to whether or not the Land Department had jurisdiction to determine whether the land involved in that action was mineral land or agricultural land. The court pointed out in that case that the Land Department had no jurisdiction over land which was not public property of the United States. In that case the court said (p. 278):

> "* * * If the department has jurisdiction, that is, if the land belongs to the United States, and provision has been made by law for its sale, the issuance of a patent is an adjudication that the grantee of the government has performed the acts necessary to entitle him to receive the patent. * * *"

The case of *Producers Oil Co. v. Hanzen,* 238 U. S. 325, cited and relied upon by the petitioners in support of their contention that the meander line constitutes the boundary line, is not applicable to the facts in this case. That case is favorable to respondent's contention, *i. e.,* that when the United States conveys a tract of land by patent, referring to an official plat which shows the same bordering on navigable water, the purchaser takes title up to the water line. In that case the court said:

> "Many causes decided by this court involved construction of patents conveying public lands by reference to official surveys and plats indicating streams or other waters. St. Paul & P. R. Co. v. Schurmeir, 7 Wall. 272, 286, 19 L. Ed. 74, 78; Cragin v. Powell, 128 U. S. 691, 696, 32 L. Ed. 566, 567, 9 Sup. Ct. Rep. 203; Hardin v. Jordan, 140 U. S. 371, 380,

35 L. Ed. 428, 432, 11 Sup. Ct. Rep. 808, 838; Mitchell v. Smale, 140 U. S. 406, 412, 35 L. Ed. 442, 444, 11 Sup. Ct. Rep. 819, 840; Horne v. Smith, 159 U. S. 40, 42, 40 L. Ed. 68, 69, 15 Sup. Ct. Rep. 988; Grand Rapids & I. R. Co. v. Butler, 159 U. S. 87, 92, 40 L. Ed. 85, 87, 15 Sup. Ct. Rep. 991; Ainsa v. United States, 161 U. S. 208, 229, 40 L. Ed. 673, 680, 16 Sup. Ct. Rep. 544; Niles v. Cedar Point Club, 175 U. S. 300, 306, 44 L. Ed. 171, 173, 20 Sup. Ct. Rep. 124; French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 51, 46 L. Ed. 800, 802, 22 Sup. Ct. Rep. 563; Kirwan v. Murphy, 189 U. S. 35, 47 L. Ed. 698, 23 Sup. Ct. Rep. 599; Hardin v. Shedd, *supra;* Security Land & Exploration Co. v. Burns, 193 U. S. 167, 48 L. Ed. 662, 24 Sup. Ct. Rep. 425; Whitaker v. McBride, *supra;* Graham v. Gill, 223 U. S. 643, 645, 56 L. Ed. 586, 588, 32 Sup. Ct. Rep. 396; Scott v. Lattig, 227 U. S. 229, 244, 57 L. Ed. 490, 497, 44 L. R. A. (N. S.) 107, 33 Sup. Ct. Rep. 242; Chapman & D. Lumber Co. v. St. Francis Levee Dist., 232 U. S. 186, 196, 58 L. Ed. 564, 567, 34 Sup. Ct. Rep. 297; Gauthier v. Morrison, 232 U. S. 452, 459, 58 L. Ed. 680, 684, 34 Sup. Ct. Rep. 384; Forsyth v. Smale, 7 Biss. 201, Fed. Cas. No. 4,950. A review and analysis of these cases would be tedious and unprofitable; thorough acquaintance with the varying and controlling facts is essential to a fair understanding of them. They unquestionably support the familiar rule relied on by counsel for the oil company that, in general, *meanders are not to be treated as boundaries, and when the United States conveys a tract of land by patent referring to an official plat which shows the same bordering on a navigable river, the purchaser takes title up to the water line.* * * *".

In the *Producers Oil Co.* case, *supra,* the lines as established by the surveyor were held to be the boundary line for the reason pointed out in the opinion in that case—that the land described in the patent did not border on navigable water. In that case the court said:

> "In the instant case we find a survey of improved lands made at the express request of the occupant to whom they were subsequently patented; a grant from the United States specifying the exact number of acres conveyed; a positive declaration in field notes that land to the north lies outside the traverse lines; admission that excluded area contains not less than 40 acres of high ground, and evidence of large timber growing there; official plat delineating the surveyor's courses and specifying acreage of the several subdivisions, which cannot be said to indicate a water boundary beyond possible question. Outside the southern traverses of this plat, in space designated 'Open Lake', lie 300 acres of fast land surveyed by Barbour in 1896. * * *"

also:

> "'It is admitted by both parties that the land in controversy is high land and was high land at the date that Bristol made his survey in 1871.'"

In the case at bar there was no upland beyond the exterior boundaries of the meander line as established by the surveyor Norway. In fact, all of the meander lines, including the meander corners, were below the line of mean high tide.

The case of *Mitchell v. Smale,* 140 U. S. 406, cited by the petitioners, is likewise favorable to the respondent. In that case the court said:

> "It has been decided again and again that the meander line is not a boundary, but that the body of water whose margin is meandered is the true boundary. (Citing Cases.)"

The Land Department of the Federal Government Had No Jurisdiction to Patent, Grant, or Transfer Title to the Land Involved in This Action.

Even if it be conceded that the meander lines of the Norway survey were intended as boundaries—which, of course, the respondent does not so concede—after the State of California was admitted into the Union, Congress had no power or authority to issue a patent or make a grant of tidelands within the State of California to any person or corporation whatsoever. Therefore, the patent, so far as it attempted to operate as a conveyance of tidelands, was inoperative and void. This point has been definitely settled by this court in the following decisions:

Pollard's Lessee v. Hagan, et al., 3 How. 212;

Goodtitle v. Kibbe, 9 How. 421;

Mobile Transportation Co. v. Mobile, 187 U. S. 479;

Illinois Central R. R. Co. v. Chicago, 176 U. S. 646;

Water Power Co. v. Water Commissioners, 168 U. S. 349;

Niles v. Cedar Point Club, 175 U. S. 300.

See, also:

United States v. Mackey, 214 Fed. 137;

U. S. v. Chandler-Dunbar Water Power Co., 152 Fed. 25;

Scranton v. Wheeler, 57 Fed. 803;

Cooley v. Golden, 23 S. W. 100, 21 L. R. A. 308;

St. Louis I. M. & S. Ry. Co. v. Ramsey, 13 S. W. 931.

The cases of *Pollard's Lessee v. Hagan, et al.*, and *Goodtitle v. Kibbe, supra,* are the leading cases on the question as to whether or not Congress has authority to make grants of tidelands to individuals or corporations after a state is admitted into the Union. The case of *Pollard's Lessee v. Hagan, et al., supra,* was an action in ejectment, and the only question involved in that case was whether or not the land involved in the action was below the line of usual high water mark at the time Alabama was admitted into the Union. The case was tried before a jury and the trial court charged the jury as follows:

> "If they believed the premises sued for were below usual high water-mark, at the time Alabama was admitted into the Union, then the act of Congress, and the patent in pursuance thereof, could give the plaintiffs no title, whether the waters had receded by the labour of man only, or by alluvion."

Therefore, the question was squarely presented to this court in that case as to whether or not the court's instructions to the jury correctly stated the law, and in that case the court said:

> "This question has been heretofore raised, before this court, in cases from the same state, but they

went off upon other points. 'As now presented, it is the only question necessary to the decision of the case before us, and must, therefore, be decided. And we now enter into its examination with a just sense of its great importance to all the states of the Union, and particularly to the new ones. Although this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the government of the Union, and the state governments, over the subject in controversy, many of the principles which enter into and form the elements of the question have been settled by previous, well considered decisions of this court, to which we shall have occasion to refer in the course of this investigation."

In the same case, at page 229, the court said:

"'When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.'"

Also, at page 230, the court said:

"* * * The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

In the case of *Goodtitle v. Kibbe, supra*, the same question was presented to this court for its decision. The facts in that case were practically identical with those in the case at bar. The State of Alabama was admitted into the Union in 1819; the State of California was admitted into the Union in 1850. The plaintiff Goodtitle claimed title by virtue of a patent dated March 15, 1837, which

was issued to plaintiff pursuant to an act of Congress; the petitioners herein claim title by virtue of a patent which was issued to William Banning in 1881, thirty-one years after the State of California was admitted into the Union. In the case of *Goodtitle v. Kibbe,* the question presented to this court for its decision was whether or not a patent to land lying below the high water mark after the State of Alabama was admitted into the Union conveyed title to the patentee named therein. In that case the court said (p. 477):

> "The validity of this title was disputed by the defendant, upon the ground that the premises were a part of the shore of the navigable tide-water river, lying below high-water mark, when the State of Alabama was admitted into the Union in 1819; and that therefore, at the time of the passage of the act of Congress, the sovereignty and dominion over the place in question were in the State, and not in the United States. And the court instructed the jury, that, if the land described in the plaintiff's declaration was below ordinary high-water mark at the time Alabama was admitted into the Union, the confirming act of Congress and the patent conveyed no title to the patentee.
>
> "The question decided in the State court cannot be regarded as an open one. The same question upon the same act of Congress and patent was brought before this court in the case of Pollard v. Hagan, at January term, 1845, reported in 3 Howard, 212. That case was fully and deliberately considered, as will appear by the report, and the court then decided that the act of Congress and patent conveyed no title. The decision of the Supreme Court of Alabama, from which this case has been brought by writ of error, conforms to the opinion of this court in the

case of Pollard v. Hagan. And it must be a very strong case indeed, and one where mistake and error had been evidently committed, to justify this court, after the lapse of five years, in reversing its own decision; thereby destroying rights of property which may have been purchased and paid for in the meantime, upon the faith and confidence reposed in the judgment of this court. But, upon a review of the case, we see no reason for doubting its correctness, and are entirely satisfied with the judgment then pronounced.

"It has been supposed, in the argument for the plaintiff, that the proceedings in Congress upon the report of the commissioners in relation to the title claimed under the Spanish authorities, which have now been referred to, distinguish this case from that of Pollard v. Hagan. But this Spanish title was acquired in 1809, and it has been repeatedly decided that a Spanish grant in this territory, whether inchoate or complete, made after the treaty of St. Ildefonso, in 1800, did not convey any right in the soil to the grantee. And this subject was again considered and decided, after careful research and examination, at the present term, in the case of Reynes v. United States, and the former decisions reaffirmed. Undoubtedly, Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a state. But this was not done. And the existence of this imperfect and inoperative Spanish grant could not enlarge the power of the United States over the place in question after Alabama became a State, nor authorize the general Government to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the State.

"The judgment of the Supreme Court of Alabama is therefore affirmed."

The Finding of the Trial Court Was Based Solely Upon the Erroneous Conclusion of Law That the Patent Was Conclusive Evidence of the Character of the Land Involved in This Action.

Throughout the petition and the brief in support thereof counsel for petitioners refer to the fact that the trial court found that the land involved in this action was not tideland. The Circuit Court of Appeals was fully advised, and counsel for the petitioners well know, that the finding and decision of the trial court was based solely upon the erroneous conclusion of law that the patent was conclusive evidence of the character of the land involved in this action and that the shore line was conclusively determined by the patent and the Norway survey and that the city could not prove its actual location.

We call the court's attention to the memorandum decision of the trial court [R. 161]; also to the statement of the court at the time of the granting of petitioners' motion to dismiss the respondent's bill of complaint [R. 634]. From the memorandum decision hereinabove referred to and also the statement of the trial court at the time of the granting of the motion to dismiss, it is clear that any findings made by the trial court that the lands involved in this action were not tidelands, were based on the erroneous conclusion of law that the patent was conclusive and that the establishment of such meander lines by the surveyor employed by the Land Department made all lands lying within such meander lines uplands as a matter of law regardless of whether or not a portion of the land within such lines was in fact tideland. Had the trial court determined the question as to whether or not the land involved in this action was in fact tideland, from the evidence introduced by the respondent the court would

have been compelled to find that the land was in fact tideland. The trial court in its memorandum decision made the following statement:

> "The plaintiff (respondent herein) introduced evidence from which the conclusion might be drawn that the land in question is below the line of ordinary high water mark." [R. 161.]

A Patent Is Not Conclusive Unless the Land Department Has Jurisdiction to Issue It.

A patent is conclusive only when the Land Department has jurisdiction to act upon the matter which is before it. The Supreme Court has had occasion to point out that when the Land Department attempts to act on matters over which it has no jurisdiction, its acts are a nullity and void. Instances where patents for land have been issued and have been declared void are as follows:

(1) The lands patented were not at the time public property;

(2) If at the time the lands were patented they had been previously disposed of;

(3) No provision had been made for their sale or other disposition;

(4) The lands patented had been reserved from sale.

This honorable court has on numerous occasions ruled that when a patent has been issued in such cases as above enumerated, the attempted conveyance of such land by

patent is inoperative and void, no matter with what seeming regularity the forms of law may have been observed.

Lake Superior etc. Co. v. Cunningham, 155 U. S. 354;

Hardin v. Jordan, 140 U. S. 371;

Wright v. Roseberry, 121 U. S. 488;

Steel v. Smelting Co., 106 U. S. 447;

Smelting Co. v. Kemp, 104 U. S. 636.

See, also:

Edwards v. Rolley, 96 Cal. 408;

Brown v. Luddy, 121 Cal. App. 494;

People's Water Co. v. Perkins, 34 Cal. App. 513.

In the case of *Wright v. Roseberry, supra,* which was an action to recover possession of a tract of land in the County of Yolo, State of California, the court said (p. 518):

"'It is the duty of the Land Department, of which the Secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the preemption laws, and his judgment as to this fact is not open to contestation in an action at law by a mere intruder without title.' But this doctrine has no application where a party, whether plaintiff or defendant, asserts title to premises in controversy from a paramount source, or by a prior conveyance from a common source. The doctrine that all presumptions are to be indulged in support of proceedings upon which a patent is issued, and which is not open to collateral attack in an action of ejectment, has no application where it is shown that the land in controversy had, before the initiation of the proceed-

ings upon which the patent was issued, passed from the United States. The previous transfer is a fact which may be established in an action at law as well as in a suit in equity. As we said in Smelting Co. v. Kemp, 104 U. S. 636, 641: 'When we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.'

"And again, in the same case, we said, p. 646: 'A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars the judgment of the department upon matters properly before it is not as-

sailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed.'

" 'There are cases,' said Chief Justice Marshall, 'in which a grant is absolutely void; as where the State has no title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law.' Polk v. Wendall, 9 Cranch, 87, 99. Indeed it may be said to be common knowledge that patents of the United States for lands which they had previously granted, reserved for sale, or appropriated, are void. Easton v. Salisbury, 21 How. 426; Reichart v. Felps, 6 Wall. 160; Best v. Polk, 18 Wall. 112. It would be a most extraordinary doctrine if the holder of a conveyance of land from a state were precluded from establishing his title simply because the United States may have subsequently conveyed the land to another, *and especially from showing that years before, they had granted the property to the state, and thus were without title at the time of their subsequent conveyance.* As this court said in New Orleans v. United States, 10 Pet. 662, 731: 'It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor no right passes to the grantee. *A grant has been frequently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative.*' "

It is always permissible to show by extrinsic evidence that a patent is void for want of authority to issue it.

Doolan v. Carr, 125 U. S. 618.

In *Doolan v. Carr, supra,* the court had before it for its determination the question as to whether or not oral testimony was admissible to show a lack of authority in the Land Department for the issuance of the patent which was involved in that action. The court said (p. 624):

> "There is no question as to the principle that where the officers of the government have issued a patent in due form of law, which on its face is sufficient to convey the title to the land described in it, such patent is to be treated as valid in actions at law, as distinguished from suits in equity, subject, however, at all times to the inquiry whether such officers had the lawful authority to make a conveyance of the title. But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in them to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, *may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.*
>
> "The decisions of this court on this subject are so full and decisive that a reference to a few of them is

all that is necessary. Polk's Lessee v. Wendall, 9 Cranch, 87; New Orleans v. United States, 10 Pet. 662, 730; Wilcox v. Jackson, dem. McConnell, 13 Pet. 498, 509; Stoddard v. Chambers, 2 How. 284, 317; Easton v. Salisbury, 21 How. 426, 428; Reichart v. Felps, 6 Wall. 160; Best v. Polk, 18 Wall. 112, 117; Leavenworth Railroad v. United States, 92 U. S. 733; Newhall v. Sanger, 92 U. S. 761; Sherman v. Buick, 93 U. S. 209; Smelting Co. v. Kemp, 104 U. S. 636; Steel v. Smelting Co., 106 U. S. 447; Kansas Pacific Railway Co. v. Dunmeyer, 113 U. S. 629, 642; Reynolds v. Iron Silver Mining Co., 116 U. S. 687."

AN APPEAL WITHIN THE LAND DEPARTMENT IS NOT THE ONLY REMEDY WHEN THE LAND DEPARTMENT HAS ACTED IN EXCESS OF ITS JURISDICTION.

The contention of the petitioners that when the Land Department has attempted to convey land over which it has no jurisdiction, or when it has issued a patent to lands which have been previously disposed of or have been reserved from sale or which are not public lands and subject to sale and other disposition by the Land Department, the only remedy is by an appeal within the Land Department, is contrary to the decision of this honorable court in the case of *Hardin v. Jordan, supra,* wherein, at page 400, the court said:

"A question is made with regard to the effect of the proceedings which took place before the register and receiver of the local land office, and, by appeal, before the Commissioner of the General Land Office and the Secretary of the Interior, in relation to the right of the government to survey and grant the

lands under Wolf Lake in 1874. Both Hardin and De Witt were notified of said proceedings and appeared and contested the same; but the decision was against them and in favor of the government. It is contended that by this decision the question became *res judicata,* and that Hardin and DeWitt and those claiming under them are bound thereby. It is very true that the decisions of the land department on matters of fact within its jurisdiction, made in due course of administration, cannot be called in question collaterally. But, as was declared in the recent case of Davis v. Weibold, 139 U. S. 507, decided at the present term of this court, 'if the lands patented were not at the time public property, *having been previously disposed of,* or no provision had been made for their sale or other disposition, or they had been reserved from sale, the department had *no jurisdiction to transfer the lands,* and their attempted conveyance by patent is *inoperative and void.*'"

The Date Title to the Tidelands Involved in This Case Vested in California Is Material.

California was admitted into the Union on September 9, 1850. Upon the admission of the state into the Union it became the owner of all the tidelands within its borders, save and except such lands as had been previously granted to some pueblo or individual by Spanish grant. This is conceded to be the law by the petitioners herein. Therefore, inasmuch as the State of California became the owner of said lands by virtue of its sovereignty, the land involved in this action was "disposed of" so far as the United States Government was concerned.

The Land Department has no jurisdiction to transfer land or issue a patent to land which has been previously disposed of.

Hardin v. Jordan, 140 U. S. 371;

Davis v. Weibold, 139 U. S. 507;

Francoeur v. Newhouse, 40 Fed. 618.

The question as to whether or not lands have been previously disposed of is a judicial question to be determined by the court. This question has been definitely settled by this honorable court in the case of *Hardin v. Jordan, supra*, wherein the court said (p. 401):

"* * * if the lands had been 'previously disposed of,' the department has no jurisdiction over them; and the question whether they have, or have not, been previously disposed of is a judicial question, and not determinable by the executive department, except for the purpose of governing its own conduct in the administration of its functions. The same principle is involved in Moore v. Robbins, 96 U. S. 530, 533, 534, where it is said by Mr. Justice Miller, speaking for the court: 'With the title passes away all authority or control of the executive department over the land, and over the title which it has conveyed. It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, error or wrong has been done, the *courts of justice* present the *only remedy*.'"

The Land Involved in This Action Is, in Fact, Tideland.

Petitioners state (Pet. 23-24) that the opinion of the Circuit Court was based on the "assumption" that the land involved in this action was tideland. This we submit is contrary to the record. As stated by petitioners (Pet. 10) the respondent, in the trial court, had presented its case in chief, and upon the conclusion thereof the court ordered respondent's bill of complaint dismissed on the sole ground that the patent issued to William Banning was conclusive and that it conveyed all of the land within the exterior boundaries of the meander lines as surveyed by Norway, regardless of whether or not a portion of the land within those lines was in fact tideland and regularly covered and uncovered by the ebb and flow of the tide. There is no conflict in the evidence. No evidence was offered by the petitioners as to the character of the land. The petitioners were content to, and did, rely solely upon the patent issued to William Banning.

The uncontradicted evidence shows that the land involved in this action is in fact tideland and submerged land. We will not take time to set forth here all of the evidence introduced by the respondent in support of its allegation that the land involved in this action was situated below the line of mean high tide of the Pacific Ocean and was tideland and submerged land and regularly covered and uncovered by the ebb and flow of the tide, but in view of the petitioners' assertion that the opinion of the Circuit Court was based on the "assumption" that the land involved in this action was tideland, we deem it appropriate to call the court's attention to the uncontradicted evidence in that regard.

We call the court's attention to respondent's Exhibits Nos. 20 and 23 [Book of Exhibits 24, 26]. Ex. 20 is a topographic map of the inner bay of San Pedro, made by the United States Coast & Geodetic Survey in 1859. Mormon Island is shown on this map as marsh land. Ex. 23 is a coast survey map or chart of the inner bay of San Pedro, made by the United States Coast & Geodetic Survey in the year 1852. This map shows that there was no upland within the inner bay of San Pedro, but that the whole of the inner bay was either marsh land or mud flats.

A map made by the United States Coast & Geodetic Survey is conclusive as to what it purports to show. This question was before the Circuit Court of Appeals in the case of *United States v. Romaine*, 255 Fed. 253, in which case the court said:

> "The appellant introduced in evidence certain hydrographic maps made by the United States Coast and Geodetic Survey, one in 1856 and one in 1887. The court below disregarded these maps, saying, 'I do not think that the hydrographic maps are of any weight in this testimony in contradiction to the evidence that is presented'; and, relying upon the testimony of certain white witnesses, the court reached the conclusion that the testimony of the Indian witnesses and the other evidence adduced by the appellant were insufficient to sustain its contention.
>
> "We are unable to agree with the trial court as to the effect which should be given to the hydrographic maps of the United States Coast and Geodetic Survey as evidence in this case. We think the maps should be given full credence, and should be taken as absolutely establishing the truth of all that they purport to show."

We also call the court's attention to respondent's Exhibits Nos. 10 and 11, [Book of Exhibits 12, 13], being photographs of the inner bay of San Pedro, taken in the year 1908. These photographs show at a glance the character of the land involved in this action.

We also call the court's attention to respondent's Ex. 7 [Book of Exhibits 10], being a map of the inner bay of San Pedro, California, made in January, 1881. Mormon Island is shown on the map as a long narrow tract of land with a notation on said map showing Mormon Island as "one foot above high water".

We also call the court's attention to the testimony of Frederick C. Turner [R. 229]. Mr. Turner made a survey of Mormon Island in the year 1899. He located the high water mark from his observation of the physical facts which appeared upon the ground. A map was made of his survey, which was made by Mr. Turner, to-wit, respondent's Exhibit 4 [Book of Exhibits 7]. Mr. Turner made a written report of his survey of the inner bay of San Pedro to his superior officer, Captain Meyler, which report was incorporated in House of Representatives Document No. 357, to-wit, respondent's Ex. 6 [R. 240]. Attached to said report was a copy of a map as made from the field notes of the survey of Mr. Turner. That map shows all of the land involved in this action as being marsh land. The field notes of the Turner survey were filed in the office of the United States Engineer. The field notes were replotted by Mr. Charles A. Hale. Said plot sheet as prepared by Mr. Hale was introduced in evidence, respondent's Ex. 5 [Book of Exhibits 8]. The high water mark as established by Turner is shown on respondent's Ex. 5 by the heavy blue line. This exhibit also shows that

a slough, which was located in the northerly portion of the island, severed the island into two parcels, said slough extending in a northeasterly direction. Practically all of the land involved in this action lies north of this slough. The uncontradicted evidence in this case shows that the tidal isle lying north of the slough was covered and uncovered by the ebb and flow of the tide. The uncontradicted evidence also shows that the elevation of the edge of this tidal isle and edge of grass around the exterior boundaries of this tidal isle was 3.8 feet and 3.7 feet above the datum plane of mean lower low water (See respondent's Ex. 4; Book of Exhibits 7). Mr. Turner testified that he had observed the island on numerous occasions when the tide was at various heights and that he had observed the portion of the island lying north of the slough covered with water [R. 302].

Mr. Hughes testified that that portion of the island lying north of the slough would be entirely covered with water when the tide was at an elevation of five feet; that he had observed that portion of the island covered with water many times and had waded and walked over the island when it was so covered with water [R. 319]. Mr. Hughes also testified that "as a result of his study, he ascertained that the mean of all the high tides in and around Mormon Island was 5.1 feet above the datum plane of mean lower low water, and the mean of all the higher high tides was 5.8 feet above the same datum plane; that he examined the Island in reference to the point the water reached on the ground at which time he had with him the map as made by the witness Frederick C. Turner, and that the lines as traversed on the ground by the surveyor Turner and the line determined by him to be the high water mark were covered by water when the tide was at

an elevation of 5.1 feet above the datum plane of mean lower low water, and that the elevation of the line of ordinary high water mark as established by surveyor Frederick C. Turner was something lower than 5.1 feet in elevation." [R. 331.]

Gerald C. Fitzgerald, a civil engineer who made a survey of the island in 1909, testified as follows: "That portion of the Island lying north of the slough was prior to the reclamation of 1909 lower than that portion of the land shown on Plaintiff's Exhibit No. 5 between the heavy blue lines; that when the tide reached an elevation of five feet that portion of the Island lying immediately north of the slough would be entirely covered with water." [R. 378.]

Harrison R. McLaurin testified as follows: "That he had seen the Island on numerous occasions when it was in a state of nature and that he had seen that portion of the Island which lies immediately north of the slough entirely covered with water on many occasions; that when it was covered with water the tide would be at approximately five feet elevation." [R. 386.]

We also call the court's attention to respondent's Ex. 15 [Book of Exhibits 16], being the map made and prepared by the witness Gerald C. Fitzgerald, which shows the 4.3, 4.8, 5.1, 5.7, and 7-foot contour lines, and also call the court's attention to the fact that this exhibit shows that there is no land involved in this action which is above 5.1 feet above the datum plane of mean lower low water.

The witness Hughes was an engineer employed by the United States Government to assist the Board of Engineers, being a board created for the purpose of recom-

mending the location and establishment of harbor lines in the bay at San Pedro. He testified [R. 328-329] that he had restored the meander lines as surveyed by Norway and also the meander corners of the Norway survey and that all the corners as restored by him were below ordinary high water mark, and that those on the east, south, and north were about half tide level and that that would be an elevation of about three feet above the plane of mean lower low water.

In reference to the character of the land involved in this action; as to whether or not it is in fact tideland, we call the court's attention to the fact that the title to Mormon Island has heretofore been the subject of litigation in an action entitled, *DeGuyer v. Banning,* 91 Cal. 400, affirmed by this honorable court in 167 U. S. 723. In that action the plaintiffs were the heirs of the patentee named in the patent to the Rancho San Pedro, and William Banning, the defendant in this action, to-wit, *DeGuyer v. Banning,* was the patentee named in the patent involved in the case at bar. The plaintiffs DeGuyer and others were claiming under the patent to the Rancho San Pedro, and Banning was claiming under the patent issued directly to him by the United States Government in December, 1881. William Banning testified in that action in his own behalf and this honorable court had occasion to quote a part of his testimony, which is found in 167 U. S. at page 734, and which is as follows:

"Banning testified in his own behalf that he entered into possession of Mormon Island in 1880, his possession beginning by his buying out the person then on the island. But he does not state who that person was or by what right he was in possession. He also testified that when he took possession he claimed that

the title was in the United States, and he continued to so claim until he obtained a patent from the United States, when he claimed the property for himself; and that he has been in possession since 1890, no one else claiming the right of possession until the present plaintiffs set up their claim by this suit. He said: 'This tract of land known as Mormon Island is an island; at about half tide it is an island, and is now an island, at low water; at low water it is only partly surrounded by water; at low water it would not be surrounded with water; at mean tide there would be about two feet of water around it; at high tide it is almost all covered with water. . . . A very small portion of the island is above ordinary high water. At mean tide, I don't think there is an acre above water. *The descriptive clause in the patent to me extends to mean low water.* I think to include eighteen acres would carry it to mean low water. We occupied a portion of it that was covered with water. I have shipways there and houses on piles. About an acre is covered in that way. Another portion of the island we run lighters on and pile lumber on when the high tide falls. We use in that way sometimes a couple of acres on the west side, the channel side of the island, and that kind of occupation would cover about three acres.'"

In that case the court referred to the fact that Mormon Island was practically covered with water at high tide, and in this connection the court, at page 735, said:

"It is not disputed that Mormon Island is within the exterior lines of this inner bay, and is almost covered with water at high tide. That the part excluded or excepted from the survey embraced the navigable waters of the inner bay cannot be doubted."

In the case of *De Guyer v. Banning, supra,* the court did not decide the question as to whether or not William Banning was the owner of said land by virtue of said patent issued to him in December, 1881. It decided that Mormon Island was not conveyed to the patentees named in the patent to the Rancho San Pedro. Neither did it decide whether or not Mormon Island passed to the State of California upon its admission into the Union in 1850, and in disposing of his question the court said:

> "It is proper to say that the court decides nothing more in this case than that the plaintiffs are not entitled to recover possession of the specific lands here in controversy. In this view it is unnecessary to decide whether the defendant Banning was entitled to a judgment on his cross-complaint, nor whether the lands under the navigable waters of the inner bay of San Pedro, and those here in controversy or any part thereof, passed to the State of California upon its admission into the Union, or after the issuing of the patent of 1858."

The Line of Mean High Tide Is the True Boundary Line Between Tideland and Upland.

The petitioners argue that the boundary line between tideland and upland is the ordinary high water mark and that ordinary high water mark means the mark which is actually made on the ground by the action of the water. The Circuit Court in its opinion in this case so clearly described the boundary line as being the line of mean high tide and so clearly set forth the reasons therefor [R. 724 to 732, inc.] that further argument or citation of authority seems unnecessary.

It is the contention of the respondent herein that "ordinary high water mark" and "mean high tide" are synonymous terms. This is plainly to be seen from the case of *Oakland v. Oakland Water Front Co.*, 118 Cal. 168-185, where such terms were frequently used interchangeably to designate the line of ordinary or mean high tide.

The petitioners' argument that the mean of the neap tides is the boundary is inconsistent with their argument that the ordinary high water mark is the boundary line. Neap tides are defined as the tides occurring at the times of the first and third quarters of the moon; neap range, the range of the tides at the time of neap tides. Neap tides are the lowest high tides of the month.

Tideland has been judicially defined as being the land over which the tide regularly ebbs and flows, or which is covered and uncovered by the ebb and flow of the tide.

Packers etc. v. Packers Assn., 138 Cal. 632;
Mann v. Tacoma Land Co., 153 U. S. 273;
Baer v. Moran, 153 U. S. 287.

In the case of *Baer v. Moran, supra*, the court, in defining tideland, said:

> "* * * covered and uncovered by the ebb and flow of the tide, was uncovered at ordinary low tide and was covered with water at ordinary high tide," and was "thus alternately covered and uncovered and between the dry upland and the navigable water is land which may be used in facilitating approach to the navigable waters from the upland, and is strictly

within the description of 'tide lands,' and covered by the rule in respect to such lands."

If it should be determined that the mean of the neap tides constitutes the boundary between tideland and upland, a large portion of the land which is regularly covered and uncovered by the ebb and flow of the tide would be placed in the class of upland. We believe that it is now, and for some years last past has been, generally understood by all departments of the federal government, and particularly by the Engineering Department of the War Department, and by the United States Coast and Geodetic Survey, that the mean high tide line is the boundary line between tideland and upland.

THE CALIFORNIA COURTS HAVE DETERMINED THE "LINE OF MEAN HIGH TIDE" TO BE THE BOUNDARY LINE BETWEEN TIDELAND AND UPLAND.

The courts of California have definitely determined that the line of mean high tide is the boundary line between tideland and upland in California.

Federal courts are bound by the rulings of state courts on questions involving title to property or in construing local statutes. This is conceded by petitioners to be the rule. (Pet. 18.)

In the cases of *Los Angeles v. San Pedro etc. R. R. Co.*, 182 Cal. 652, and *City of Los Angeles v. Duncan*, 130 Cal. App. 11, one of the questions which was before the courts for their determination was the question of what

line constituted the boundary line between tideland and upland in the State of California, and in those cases the courts determined the line of mean high tide to be the true boundary line. In the *San Pedro etc. R. R.* case, *supra*, at page 658, the court said:

> "Had the description ended with the word 'San Pedro' in the following phrase, 'Excepting, reserving and excluding from the tract as thus surveyed that portion thereof covered by the navigable waters of the inner bay of San Pedro', the title to the tidelands of the bay would unquestionably be in the plaintiff, for the reason that it is thoroughly established that the term 'navigable waters' include all waters below the *high-tide line*, and the phrase thus used is equivalent to the statement 'that portion thereof covered by the waters of the inner bay of San Pedro at *mean high tide*.'"

Again, at page 663, the court said:

> "In legal contemplation, the bay may always be said to extend to the *mean high-tide level;* as a matter of fact the actual water line is constantly changing, and perhaps the mean high-tide level, as now so definitely and accurately determined, may have been unknown in 1858 when the survey for the patent was made."

In that case it was conceded by all parties to that action that the line of mean high tide was 5.1 feet above the datum plane of mean lower low water.

The case of *City of Los Angeles v. Duncan, supra,* was an action involving the boundary line between tideland and upland in the City of Los Angeles. In that case the court said (p. 14):

> "* * * The map itself, together with its maker's explanation, shows that the sinuous line was intended as a meander approximately locating the line of mean high tide. *Therefore the line of mean high tide,* as it actually existed on the ground, rather than this meander line, *constituted the real boundary.* (Curtis v. Upton, 175 Cal. 322 (165 Pac. 935); Los Angeles v. San Pedro etc. R. R. Co., 182 Cal. 652 (189 Pac. 449).)."

The State of California recognizes the boundary line between tideland and upland as being the line of mean high tide. The descriptive clause in the act of the legislature of the State of California (Stats. 1911, p. 1256) granting the tidelands to the respondent herein, is as follows:

> "Section 1. There is hereby granted to the city of Los Angeles, a municipal corporation of the State of California, and to its successors, all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all tide lands and submerged lands, whether filled or unfilled, within the present boundaries of said city, and situated *below the line of mean high tide* of the Pacific Ocean, or of any harbor, estuary, bay or inlet within said boundaries, to be forever held by said city, and by its successors, in trust for the uses and purposes, and upon the express conditions, following, to-wit: * * * "

The decisions of the California courts relied upon by petitioners in support of their contention that the mean of the neap tides is the boundary line are not in point. As pointed out by the Circuit Court in its opinion in this case [R. 726], the statement of Judge Field in the case of *Teschemacher v. Thompson,* 18 Cal. 11, which statement has been quoted by the courts of California in the cases cited by petitioners in their brief (Pet. Br. 53), was dictum.

In the case of *Otey v. Carmel Sanitary Dist.,* 219 Cal. 310, the court states that "ordinary high water mark is the limit reached by the neap or *twice-a-day* tides." Twice-a-day tides are not necessarily neap tides.

Petitioners' Argument in Regard to Meander Lines Constituting Boundary Lines, Inconsistent.

Petitioners argue (Pet. Br. 42) that the meander lines as surveyed by Norway constitute the boundary line, and at page 48 of their brief petitioners argue that "meander lines are *prima facie* evidence of the shore line location," and under that heading cite authorities in support of their argument that meander lines are only *prima facie* evidence of the boundary line.

Assuming, without admitting, that meander lines are *prima facie* evidence of the shore lines, the question of whether or not such meander lines are *prima facie* evidence of such shore lines is not now before this court for its consideration and decision. That question is one

which should be presented to the trial court at the time of the retrial of this action. Assuming that meander lines are *prima facie* evidence of the shore line, it then would become the duty of the trial court to determine whether or not evidence offered or to be offered by the respondent is sufficient to overcome such *prima facie* evidence. This question was not presented to or passed upon by the trial court, and we believe that it is well settled that it is only in exceptional cases that this court will review questions which have not been passed upon by the trial court.

Under the heading "Meander Lines Are Prima Facie Evidence of Shore Line" petitioners refer to certain license agreements entered into between the respondent and the petitioner Pacific Coast Borax Co. As hereinbefore stated, the petitioners relied solely upon the patent issued to William Banning as the basis for their claim of ownership to the land involved in this action.

The question of the legal effect of the license agreements referred to by the petitioners was not presented to or passed upon by the court below.

The petitioners allege, among other things [R. 52], that by reason of the execution of the agreements hereinabove referred to the respondent was and is estopped to deny the petitioners' claim of ownership. No evidence was offered by petitioners in support of that defense, and that defense was apparently abandoned by the petitioners.

It is well settled that the plea of estoppel is not available as against a municipal corporation. The land in-

volved in this action is held in trust by the respondent for the public, and the respondent is prohibited by law from selling, alienating or otherwise disposing of the same. The city charter (Subd. a, sec. 140; Calif. Stats. 1925, p. 1073) prohibits the city from selling or alienating said lands or any part or portion thereof. Also, the grant from the state contains a prohibition against the sale thereof. (Calif. Stats. 1911, p. 1256.) The constitution of the State of California (Sec. 3, art. XV) prohibits the sale of tidelands within two miles of an incorporated city. The land involved in this action was situated within the corporate limits of the City of Los Angeles at the time the petitioners claim to have acquired title thereto.

Where land is held in trust by a municipal corporation and such municipal corporation is prohibited by law from selling or disposing of such land, no rights in and to such land can be acquired adverse to the public under the doctrine of equitable estoppel. A municipality cannot do indirectly what it cannot do directly.

However, in view of the abandonment by petitioners of the separate defense to the action, as alleged in the second separate defense [R. 52-62], by reason of their failure to introduce any evidence in support thereof, we submit that the question of the legal effect of the license agreements referred to by the petitioners is not now properly before this court for its consideration, and therefore we will not transgress upon the time of this court with any further discussion thereof.

Conclusion.

In conclusion we submit that there is no important question of law involved in this action. We have hereinbefore pointed out and we submit that all of the points urged by the petitioners herein have been decided adversely to their contention by the Supreme Court of the State of California in the *San Pedro R. R.* case. The decision of the Circuit Court in this case is not in conflict with other decisions of the Circuit Court of Appeals and neither is said decisions in conflict with any decision of the Supreme Court of the State of California on any question involved herein, but, on the contrary, is in absolute harmony with the decisions of the Supreme Court of the State of California, and, likewise, is in absolute harmony with the decisions of this honorable court.

Therefore, we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

RAY L. CHESEBRO,
City Attorney,

LOREN A. BUTTS,
Special Counsel,

Solicitors for the Respondent.